Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

LORI WAGNER, PETITIONER

v.

FIRST UNUM LIFE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PETER G. EIKENBERRY
Counsel of Record
74 Trinity Place
Suite 1609
New York, NY 10006
(212) 385-1050
Attorney for Petitioner

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED

The Second Circuit affirmed the district court's grant of summary judgment to respondent insurance company, which had denied petitioner's claim for disability benefits. Respondent insurance company acts as fiduciary, administrator and appeals body for petitioner's ERISA-governed disability plan, and pays for benefits out of company coffers. Summary judgment was granted solely on the basis of an incomplete administrative record presented by respondent. The Second Circuit is involved in a split over the appropriate manner for dealing with conflicts of interest, choosing to give no weight at all to this factor unless the claimant can show in advance that the conflict affected the reasonableness of the denial of benefits. In addition, the Second Circuit joins with most, but not all, of its fellow circuits in using an arbitrary and capricious standard in place of the abuse of discretion standard prescribed by this Court in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

1. Whether, when applying an abuse of discretion standard to a plausibly raised conflicted ERISA plan administrator's decision, a court may ignore that conflict unless the claimant can show in advance that the reasonableness of the decision was affected?

2. Whether the "arbitrary and capricious" standard is a proper substitute for the "abuse of discretion" standard that this Court prescribed in *Firestone*?

3.Whether, when a district court reviews an ERISA plan administrator's decision, the court limited to the

administrative record even when that record is incomplete and does not represent all of the materials used by the plan administrator to reach a decision?

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The opinion of the United States Court of Appeals for the Second Circuit is unreported and may be found at *Wagner v. First Unum Life Ins. Co.*, 2004 WL 1303637 (2nd Cir.(N.Y.)). The Second Circuit affirmed the August 13, 2003, decision of the United States District Court for the Southern District of New York, which is unreported and may be found at *Wagner v. First Unum Life Ins. Co.*, 2003 WL 21960997 (S.D.N.Y.).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C § 1254(1).

The Second Circuit's summary order and opinion was rendered on June 14, 2004.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1001(b) provides in pertinent part, "It is hereby declared to be the policy of this chapter to protect . . . the interests of participants in employee benefit plans and their beneficiaries."

29 U.S.C. § 1104(a)(1) provides in pertinent part, "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."

29 U.S.C. § 1132(a) provides in pertinent part, "A civil action may be brought-- (1) by a participant or beneficiary-- ... (B) to recover benefits due to him

under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

STATEMENT

Lori Wagner worked as an international securities market analyst in the global retail trade and restaurant section of Arnhold and S. Bleichroeder. 5a. As an international market analyst, Ms. Wagner was required to frequently travel abroad to conduct field evaluations of target companies and their competitors. *Id.*

Ms. Wagner paid for an Employee Retirement Income Security Act ("ERISA") governed First Unum long-term disability policy through her employer. First Unum acted as plan administrator, fiduciary and appeals body for this disability plan. In addition, First Unum pays for all benefits under the plan out of its own corporate coffers.

Ms. Wagner suffers from, *inter alia*, idiopathic anaphalactic attacks, *id.*, and every doctor who discussed the restrictions from that diagnosis—including First Unum's in-house physician—recommended travel restrictions. (A76-7, 91, 162, 174, 298-9, 304-5, 381, 394-5, 413-4.) As a result of this condition, Ms. Wagner was placed on medical leave on June 19, 1999. 5a. She has been unable to work since.

Ms. Wagner applied for long-term disability benefits under her First Unum policy. *Id.* In order to be disabled under the terms of the policy, Ms. Wagner had to be incapable of performing at least one of the material duties of her occupation. 5a n.2. First Unum

initially classified Ms. Wagner as a Financial Analyst and determined that this position required no travel. 6a. In discussions with Ms. Wagner's doctor, First Unum refused to discuss her inability to travel, asserting that it was not germane. (A336-7.) Based on this determination of the material duties of Ms. Wagner's occupation, First Unum denied her disability benefits. *Id.*

Upon administrative appeal, First Unum granted Ms. Wagner's claim. (A286-7.) Ms. Wagner's occupation was reclassified as Market Analyst. 7a. First Unum began paying her disability benefits under a reservation of rights, telling Ms. Wagner it would need to interview her and have two physical examinations performed. 7a-8a.

First Unum conducted the interview with Ms. Wagner, which supported Wagner's claim of disability. 8a-9a. Subsequently, First Unum informed Ms. Wagner that it would not have doctors conduct actual examinations of her, but would instead have file reviews performed. 8a. Rather than being given Ms. Wagner's whole file and making a diagnosis and recommendations, these outside file review physicians were asked very specific, limited questions and were apparently given only portions of Ms. Wagner's file. (A152, 161, 190.) First Unum has never provided to Ms. Wagner or the courts which parts of Ms. Wagner's file were withheld from the file review physicians, nor has it provided correspondence to these doctors.

Eventually, First Unum denied Ms. Wagner benefits, stating that she was no longer disabled, despite the fact that the file review physicians

reviewed documents no more current than six months before the denial of disability. (A60-1, 72, 74-7, 93, 203-8.) Despite the reclassification of Ms. Wagner's occupation, First Unum continued to refuse to recognize that Ms. Wagner's occupation required international travel. (A116-8.) The medical support for denying the claim was based exclusively on the reports of the file review physicians, who did not interview Wagner, physically examine her, or talk to her attending physicians. *Id.*

Ms. Wagner timely requested an administrative appeal. (A71, 96.) Without ever presenting Ms. Wagner with the necessary documents to conduct an appeal, the First Unum appeals body upheld the decision of the First Unum plan administrator, once again stating that Ms. Wagner's occupation did not require international travel and that she was "no longer" disabled. *Id.*

Ms. Wagner's counsel secured a second appeal. 10a. For this second appeal, Ms. Wagner was given a significant volume of documents from the administrative record. As mentioned above, this record was incomplete. In addition, Ms. Wagner was able to submit further support from her physicians for her disability claim, in particular that her condition had not improved. 10a. Finding that this new evidence was insufficient to overturn the finding of the First Unum plan administrator, the First Unum appeals body made a final denial of benefits, yet again noting that Ms. Wagner's occupation did not require international travel and that she was "no longer" disabled. (A60-1.)

Ms. Wagner timely filed suit in the district court. 10a. First Unum presented the court with the incomplete administrative record. The district court entered its order on August 13, 2003, denying Ms. Wagner's request to discover the missing documents, and granting summary judgment to First Unum on the basis of this incomplete administrative record. 14a. Ms. Wagner appealed to the United States Court of Appeals for the Second Circuit, which on June 14, 2004, entered judgment affirming the court below. 1a-3a.

REASONS FOR GRANTING THE PETITION

The proper manner for handling ERISA § 1132(a)(1)(B) cases under abuse of discretion review, on which the circuits are split, is an important matter that warrants this Court's review. The Court has held that ERISA is governed by the standards of trust law. Therefore, the default standard of review of ERISA plan administrator's decisions to deny benefits is *de novo*. *Firestone*, 489 U.S. at 953-7. However, when the plan documents grant discretion to the plan fiduciary to make such decisions, then these decisions will be reviewed under an abuse of discretion standard. *Id.* at 954-7. When a conflict of interest on the part of the administrator is plausibly raised, it must be weighed as a factor in this determination. *Id.* at 950.

The circuits are significantly split on how to carry out *Firestone*'s directive that conflicts of interest must be weighed as a factor in abuse of discretion review. *Firestone*, 489 U.S. at 950. Four circuits require that a claimant demonstrate in advance that a conflict of interest has affected the decision of the ERISA fiduciary, and if the claimant cannot, the court gives no

weight at all to the conflict—effectively, the claimant must demonstrate that the decision was unreasonable for the court to consider the conflict at all. *Whitney v. Empire Blue Cross and Blue Shield*, 106 F.3d 475, 476-7 (2nd Cir. 1997); *Mers v. Marriott Intern. Group Accidental Death and Dismemberment Plan*, 144 F.3d 1014, 1020 (7th Cir. 1998); *Buttram v. Central States, Southeast and Southwest Areas Health and Welfare Fund*, 76 F.3d 896, 900 (8th Cir. 1996); *Jordan v. Northrop Grumman Corp. Welfare Benefit Plan*, 370 F.3d 869, 875-6 (9th Cir. 2004). Seven circuits do give some weight to conflicts of interest in determining whether the fiduciary abused its discretion, though they are split on exactly how to do so. *Pari-Fasano v. ITT Hartford Life and Acc. Ins. Co.*, 230 F.3d 415, 419 (1st Cir. 2000); *Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 378-9 (3rd Cir. 2000); *Smith v. Continental Cas. Co.*, 369 F.3d 412, 417-8 (4th Cir. 2004); *MacLachlan v. ExxonMobil Corp.*, 350 F.3d 472, 478 (5th Cir. 2003); *Miller v. Metropolitan Life Ins. Co.*, 925 F.2d 979, 984-5 (6th Cir. 1991), *Fought v. UNUM Life Ins. Co. of America*, 357 F.3d 1173, 1181-5 (10th Cir. 2004); *Brown v. Blue Cross and Blue Shield of Alabama, Inc.*, 898 F.2d 1556, 1566-7 (11th Cir. 1990). This Court has recently observed that this issue is unresolved, but declined to resolve it at the time as it was not necessary to disposition at the time. *Rush Prudential HMO , Inc. v. Moran*, 536 U.S. 355, 384 n.15 (2002). Review is warranted to resolve this issue and the split in the circuits it has caused.

Prior to *Firestone*, all of the circuits employed an arbitrary and capricious standard for all reviews of ERISA benefits denials. *Firestone*, 489 U.S. at 953. In the wake of *Firestone*, they were forced to reconsider

this position. Notwithstanding this Court's prescription of an abuse of discretion standard, eleven of the circuits have chosen to continue using the arbitrary and capricious standard when an ERISA fiduciary is given discretion. *Diaz v. Seafarers Intern. Union*, 13 F.3d 454, 358 (1st Cir. 1994); *O'Neil v. Ret. Plan for Salaried Employees of RKO Gen., Inc.*, 37 F.3d 55, 59 (2d Cir. 1994); *Nazay v. Miller*, 949 F.2d 1323, 1336 (3rd Cir. 1991); *Penn v. Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096, 1100 n.2 (5th Cir. 1990); *Davis By and Through Farmers Bank and Capital Trust Co. of Frankfort, Kentucky v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689, 694 (6th Cir. 1989); *Egert v. Connecticut Gen. Life Ins. Co.*, 900 F.2d 1032, 1035 (7th Cir. 1990); *Johnson v. Enron Corp.*, 906 F.2d 1234, 1238 (8th Cir. 1990); *Jordan*, 370 F.3d at 875; *Sandoval v. Aetna Life and Cas. Ins. Co.*, 967 F.2d 377, 380 n.4 (10th Cir. 1992); *Jett v. Blue Cross and Blue Shield of Alabama, Inc.*, 890 F.2d 1137, 1139 (11th Cir. 1989); *Block v. Pitney Bowes Inc.*, 952 F.2d 1450 (D.C. Cir. 1992). The Fourth Circuit alone has abandoned the arbitrary and capricious standard in favor of the abuse of discretion standard. *Booth v. Wal-Mart Stores, Inc. Assoc's Health and Welfare Plan*, 201 F.3d 335, 341 (4th Cir. 2000). Review is warranted to correct this split in the circuits and determine whether it is acceptable for the lower courts to use the arbitrary and capricious standard instead of the abuse of discretion standard.

When a court reviews the decisions of an ERISA plan administrator for an abuse of discretion, that court is generally limited to an administrative record prepared by the plan administrator. *Miller v. United Welfare Fund*, 72 F.3d 1066, 1071 (2d Cir. 1995); *Liston v. Unum Corp. Officer Severance Plan*, 330 F.3d 19, 23

(1st Cir. 2003); *Abnathya v. Hoffmann-La Roche, Inc.*, 2 F.3d 40, 48 n.8 (3rd Cir. 1993); *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1026-27 (4th Cir.1993) (en banc); *Wildbur v. ARCO Chemical Co.*, 974 F.2d 631, 638, 642 (5th Cir. 1992); *Miller v. Metropolitan*, 925 F.2d at 986; *Smith v. Office of Civilian Health and Medical Program of Uniformed Services*, 97 F.3d 950, 954-5 (7th Cir. 1996); *Oldenburger v. Central States Southeast and Southwest Areas Teamster Pension Fund*, 934 F.2d 171, 174 (8th Cir. 1991); *Taft v. Equitable Life Assur. Soc.*, 9 F.3d 1469, 1471-2 (9th Cir. 1993); *Sandoval*, 967 F.2d at 380.

However, denial of discovery beyond this administrative record is not due to any intrinsic meaning of the administrative record itself, but is rather because the court is limited to considering only what was before the plan administrator at the time the decision was made. *Miller v. United*, 72 F.3d at 1071; *Liston*, 330 F.3d at 23; *Abnathya*, 2 F.3d at 48 n.8; *Quesinberry*, 987 F.2d at 1026-27; *Wildbur*, 974 F.2d at 638, 642; *Miller v. Metropolitan*, 925 F.2d at 986; *Smith v. Uniformed Services*, 97 F.3d at 954-5; *Oldenburger*, 934 F.2d at 174; *Taft*, 9 F.3d at 1471-2; *Sandoval*, 967 F.2d at 380.

Nevertheless, the circuit courts have failed to make an exception to this rule for cases where the fiduciary fails to present the court with all of the documents that were before it when the decision was made. Since a proper abuse of discretion review can not be performed without access to all the materials before the plan fiduciary at the time of its decision, the district court should not be limited to the administrative record presented by that fiduciary when that record is

incomplete. Review is warranted to correct this error in the circuits' ERISA jurisprudence.

I. REVIEW IS NECESSARY TO RESOLVE A CONFLICT CONCERNING THE MANNER IN WHICH CONFLICTS OF INTEREST SHOULD BE FACTORED INTO THE ABUSE OF DISCRETION REVIEW OF AN ERISA PLAN FIDUCIARY'S DECISIONS

A. The Second Circuit Joins Three Other Circuits In Failing to Follow This Court's Holding That Conflicts of Interest Must Be Weighed In Judicial Review of Fiduciary Decisions Under 29 U.S.C. § 1132(a)(1)(B)

When determining whether there was an abuse of discretion when an ERISA fiduciary terminated plan benefits, the court must weigh a fiduciary's conflict of interest that is "plausibly raised" as a factor. *Firestone*, 489 U.S. at 950; *Pegram v. Herdich*, 530 U.S. 211, 219-20 (2000); *Moran*, 536 U.S. at 384 n15. Notwithstanding these holdings, the Second, Seventh, Eighth and Ninth Circuits have constructed their ERISA tests such that conflicts of interest will never be a factor unless the administrator's decision was already an abuse of discretion on its face. Review is necessary to correct these lines of cases.

In the Second Circuit, a conflict of interest is given no weight by the court unless the claimant has already independently shown that the conflict affected the reasonableness of the administrator's decision. 2a; *Sullivan v. LTV Aerospace & Def. Co.*, 82 F.3d 1251, 1259 (2nd Cir. 1996). Under this standard, if the

claimant cannot show that the decision was unreasonable, then the conflict of interest is effectively ignored. Thus, in order to have the Second Circuit consider the conflict, a claimant essentially must have already demonstrated that the fiduciary had abused its discretion.

In the Seventh Circuit, a conflict of interest is given no weight by the court unless the claimant has already independently provided specific evidence of actual bias. *Mers*, 144 F.3d at 1020. Thus, unless the insurance company acting as ERISA fiduciary has been careless enough to allow some specific evidence of how they treated this particular claimant in a biased fashion, the court will ignore the conflict.

In the Eighth and Ninth Circuits, a conflict of interest is given no weight by the court unless the claimant has already independently shown that there has been a serious breach of the plan trustee's duty to the plan beneficiary. *Buttram*, 76 F.3d at 900; *Jordan*, 370 F.3d at 875. Therefore, unless the claimant has shown that there was a breach of fiduciary duty, then the conflict will be given no weight. However, if the ERISA fiduciary has breached his duties to the beneficiary, then he should have already failed any abuse of discretion test, and the conflict will be moot.

Since these four circuits have failed to follow this Court's holding that conflicts of interest must be weighed as a factor in abuse of discretion review of ERISA fiduciaries when plausibly raised, review is warranted.

B. Among Those Circuits That Have Given Weight To Conflicts Of Interest, There Is Still Significant Disagreement On How To Account For This Factor

This Court has noted the presence of an unresolved issue with regards to the proper method for accounting for conflicts of interest in the ERISA context. *Moran*, 536 U.S. at 384 n15. The seven circuits who have followed this Court's holding in *Firestone* and given weight to plausibly raised conflicts of interest have produced a variety of ways of dealing with these conflicts.

The Tenth and Eleventh Circuits use a burden shifting approach to handle conflicts of interest. *Fought*, 357 F.3d at 1181-5; *Brown*, 898 F.2d at 1566-7. In both circuits, when there a conflict of interest is raised by the claimant, the burden shifts to the fiduciary to prove that the decision was not an abuse of discretion. *Fought*, 357 F.3d at 1181-5; *Brown*, 898 F.2d at 1566-7. The Tenth Circuit also has "second tier" burden shifting when the conflict is more severe, such as in cases like Lori Wagner's "when a plan administrator, who also serves as the third party insurer, has denied coverage." *Fought*, 357 F.3d at 1181-5. In such a situation, the fiduciary's evidentiary burden to pass the arbitrary and capricious test is raised from substantial evidence to the preponderance of the evidence. *Id.*

The Third, Fourth and Fifth Circuits use a sliding scale approach to weighing conflicts of interest. *Pinto*, 214 F.3d at 378-9; *Smith v. Continental*, 369 F.3d at 417-8; *MacLachlan*, 350 F.3d 472 at 478. In the Third

and Fourth Circuits, the level of scrutiny is based on the seriousness of the conflict of interest, and "deference will be lessened to the degree necessary to neutralize any untoward influence resulting from the conflict." *Pinto*, 214 F.3d at 378-9; *Smith v. Continental*, 369 F.3d at 417-8. In the Fifth Circuit, the level of scrutiny is adjusted based on how substantiated the conflict is. *MacLachlan*, 350 F.3d 472 at 478.

In the First and Sixth Circuits, the application of the arbitrary and capricious standard takes into account the circumstances of the conflict without any specific adjustment. *Pari-Fasano*, 230 F.3d at 419; *Miller v. Metropolitan*, 925 F.2d at 984-5; *but see Leahy v. Raytheon Co.*, 315 F.3d 11, 15-6 (1st Cir. 2002) (stating that a conflict of interest could merit a reduced standard of review, but finding no conflict). In the First Circuit "the possible existence of a conflict of interest would necessarily affect the court's determination of what was reasonable conduct by the insurer under the circumstances." *Pari-Fasano*, 230 F.3d at 419. For the Sixth Circuit, the standard "is shaped by the nature of the conflict of interest." *Miller v. Metropolitan*, 925 F.2d at 984-5.

Since the seven circuits that weigh conflicts of interest when plausibly raised have produced three distinct methods of dealing with those conflicts, review is warranted to unify the circuits.

II. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING WHETHER THE ARBITRARY AND CAPRICIOUS STANDARD IS A PROPER SUBSTITUTE FOR THE ABUSE OF DISCRETION STANDARD THIS COURT HAS PRESCRIBED

A. Continued Use By The Circuits Of The Arbitrary And Capricious Standard In The ERISA Context Goes Against This Court's Holding in *Firestone*

Since this Court abrogated the use of the arbitrary and capricious standard in the context of actions under 29 U.S.C. § 1132(a)(1)(B), it is inappropriate for the circuits to continue to use it. *Firestone*, 489 U.S. at 953-7.

Prior to this Court's holding in *Firestone*, the circuit courts used an arbitrary and capricious standard to review the decisions of plan administrators. *Id.* at 953. This standard was imported into the ERISA context from the jurisprudence of the Labor Management Relations Act of 1947 ("LMRA"). *Firestone*, 489 U.S. at 953. However, it is inappropriate to import the arbitrary and capricious standard wholesale into the ERISA context. *Id.* The arbitrary and capricious standard is extremely deferential to the decisions of plan administrators because the LMRA did not create any sort of private right of action, and thus the courts had to create such a standard to have jurisdiction at all. *Id.* This is not the case with ERISA, where the statute specifically creates a private right of action. *Id.* at 954.

The appropriate place to look for guidance on ERISA is in trust law. *Id.* Under trust law, the default standard of review for administrative decisions is *de novo*, and this is how courts reviewed such decisions prior to ERISA. *Id.* at 955. Nonetheless, a plan administrator may receive more deferential review if the plan documents vest discretion in him. *Id.*. For this situation, the Court looked to the law of trusts, and specifically the Restatement (Second) of Trusts. *Firestone*, 489 U.S. at 955. Based on this, the Court rejected Firestone's argument for the arbitrary and capricious standard, and instead found that where a plan document confers discretion on a fiduciary, that fiduciary's decisions are reviewed under an abuse of discretion standard when they are challenged under 29 U.S.C. § 1132(a)(1)(B). *Firestone*, 489 U.S. at 955-6.

Since this Court rejected the arbitrary and capricious standard that had been imported from the LMRA, and held that an abuse of discretion standard should be applied where an ERISA fiduciary has discretion, it is inappropriate for the circuit courts to continue using the arbitrary and capricious standard in § 1132(a)(1)(B) actions.

B. Since The Arbitrary And Capricious Standard, As Applied In The Second Circuit, Is More Deferential Than The Abuse of Discretion Standard That This Court Prescribed, It Is An Inappropriate Substitute

Since the arbitrary and capricious standard, as applied by the Second Circuit, is more deferential than the abuse of discretion standard prescribed by this

Court in *Firestone*, it is inappropriate for the Second Circuit to make this substitution.

In the Second Circuit, a decision fails the arbitrary and capricious standard if it is "without reason, unsupported by substantial evidence or erroneous as a matter of law." 2a; *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 442 (2d Cir. 1995). A decision that fails any one of these prongs will therefore fail the arbitrary and capricious test. The Second Circuit has noted that "[o]ur review under these standards is narrow and particularly deferential." *Erie-Niagara Rail Steering Comm. v. Surface Transp. Bd.*, 247 F.3d 437, 441 (2d Cir. 2001) (internal quotation marks omitted).

However, despite the officially three-pronged nature of this test, it is evident that the substantial evidence prong is the heart of the test. It is readily apparent that any action taken without reason would be void under any standard a court would apply, and in practice no ERISA fiduciary will produce a record without some reason. Likewise, any standard applied by a court would find a decision that was erroneous as a matter of law to be lacking. However, it is unclear what fiduciary decision could possibly be erroneous as a matter of law.

For example, the Second Circuit has held that "her 'regular occupation' may not be defined without some consideration of the nature of the institution where she was employed." *Kinstler v. First Reliance Standard Life Ins. Co.*, 181 F.3d 243, 253 (2d Cir. 1999). By defining Ms. Wagner only by the title Market Analyst and disregarding the extensive worldwide travel required of an international securities market analyst,

First Unum defined Ms. Wagner's regular occupation without any relation to the nature of the institution at which she was employed. This, however, was still insufficient to be found erroneous as a matter of law. It is clear that this prong has become a nullity.

Thus, the arbitrary and capricious standard is largely reduced to the substantial evidence prong. The Second Circuit has held that "[s]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Gully v. National Credit Union Admin. Bd.*, 341 F.3d 155, 163 (2d Cir. 2003) (internal quotation marks omitted) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

The abuse of discretion standard prescribed by this Court is drawn from the Restatement of Trusts. *Firestone*, 489 U.S. at 955. The Restatement describes the contours of the abuse of discretion test, listing six factors:

> (1) the extent of the discretion conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the nature of the power; (4) the existence or nonexistence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; (6) the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries.

Restat 2d of Trusts, § 187 comment d. Furthermore, this Court specifically noted that a reviewing court must additionally weigh any conflict of interest on the part of the fiduciary. *Firestone*, 489 U.S. at 950.

A plan administrator's decision survives Second Circuit scrutiny if it is supported by substantial evidence. This standard fails to take into account the factors laid out by the Restatement of Trusts. The Second Circuit's application of the arbitrary and capricious standard fails to follow this Court's guidance in that it fails to weight conflicts of interest as a factor, as described *supra*. In addition, the Second Circuit fails to consider the purpose of an ERISA trust and the nature of a fiduciary's power in that trust, that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1).

Since the Second Circuit has replaced the abuse of discretion standard with an arbitrary and capricious standard that provides even more deference to plan fiduciaries than this Court has prescribed, review is warranted to correct this problem.

C. The Circuits Are Not Unified On Whether The Arbitrary And Capricious Standard Survived *Firestone*

Since the circuits are not unified on the proper standard for judicial review of actions under 29 U.S.C. § 1132(a)(1)(B), review is warranted to correct the split.

The Second Circuit is joined by most of the other circuits in continuing to apply the LMRA arbitrary and

capricious standard in the ERISA context. *Diaz*, 13 F.3d at 358; *O'Neil*, 37 F.3d at 59; *Nazay*, 949 F.2d at 1336; *Penn*, 898 F.2d at 1100 n.2; *Davis*, 887 F.2d at 694; *Egert*, 900 F.2d at 1035; *Johnson*, 906 F.2d at 1238; *Jordan*, 370 F.3d at 875; *Sandoval*, 967 F.2d at 380 n.4; *Jett*, 890 F.2d at 1139; *Block*, 952 F.2d at 1450.

However, the Fourth Circuit has continued to follow this Court's holding in *Firestone* and apply an abuse of discretion standard rather than the overly deferential arbitrary and capricious standard. *Booth*, 201 F.3d at 341.

Review is warranted since the circuits are divided on whether the arbitrary and capricious standard is an appropriate substitute for the abuse of discretion standard prescribed by this Court in *Firestone*.

III. REVIEW IS WARRANTED BECAUSE THE DISTRICT COURT CANNOT PERFORM THE ABUSE OF DISCRETION REVIEW REQUIRED BY THIS COURT IN *FIRESTONE* WHEN THE ERISA FIDUCIARY PRESENTS AN INCOMPLETE ADMINISTRATIVE RECORD TO THE COURT

Since, even when the record created and submitted by the plan administrator is incomplete, the Second Circuit's ERISA case law does not allow the district court to go beyond that record, claimant has been deprived of the review this Court prescribed in *Firestone*.

When performing an abuse of discretion review, the district court is limited to the materials that were

available to the plan administrator at the time of the decision. *Miller v. United*, 72 F.3d at 1071; *Liston*, 330 F.3d at 23; *Abnathya*, 2 F.3d at 48 n.8; *Quesinberry*, 987 F.2d at 1026-27; *Wildbur*, 974 F.2d at 638, 642; *Miller v. Metropolitan*, 925 F.2d at 986; *Smith v. Uniformed Services*, 97 F.3d at 954-5; *Oldenburger*, 934 F.2d at 174; *Taft*, 9 F.3d at 1471-2; *Sandoval*, 967 F.2d at 380. In general, this results in the district court being limited to the administrative record compiled by the ERISA fiduciary. *Miller v. United*, 72 F.3d at 1071; *Liston*, 330 F.3d at 23; *Abnathya*, 2 F.3d at 48 n.8; *Quesinberry*, 987 F.2d at 1026-27; *Wildbur*, 974 F.2d at 638, 642; *Miller v. Metropolitan*, 925 F.2d at 986; *Smith v. Uniformed Services*, 97 F.3d at 954-5; *Oldenburger*, 934 F.2d at 174; *Taft*, 9 F.3d at 1471-2; *Sandoval*, 967 F.2d at 380. This rule serves the valuable function of preventing claimants from submitting additional evidence to the district court, such as new medical reports, that have never been seen by the plan administrator and hadn't even been created when the decision to deny benefits was made.

However, in order to have before it the materials available to the plan administrator, the district court must have the ability to authorize discovery of such relevant materials that the fiduciary has refused to present to the court in the administrative record. Despite this, no exception has been made to the general rule limiting abuse of discretion review to the administrative record prepared by the plan administrator. This failing means that an ERISA fiduciary can deny a claimant even the limited review granted under the abuse of discretion standard simply by withholding documents from the district court.

Review is warranted to ensure that ERISA beneficiaries receive the review this Court has held they are entitled to, and to ensure that ERISA fiduciaries are honest with the court and present complete administrative records for judicial review.

CONCLUSION

For all the forgoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

PETER G. EIKENBERRY*
74 Trinity Place
Suite 1609
New York, NY 10006
(212) 385-1050

* *Counsel of Record* *Attorney for Petitioner*

No. 03-7957

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LORI WAGNER,
Plaintiff-Appellant,

- v -

FIRST UNUM LIFE INSURANCE COMPANY,
Defendant-Appellee.

June 14, 2004, Filed

COUNSEL: Appearing for Appellant: PETER G. EIKENBERRY, New York, NY.

Appearing for Appellee: PATRICK W. BEGOS, Begos & Horgan, LLP, New York, NY

OPINION: SUMMARY ORDER

JUDGES: PRESENT: HON. JON O. NEWMAN, HON. GUIDO CALABRESI, HON. SONIA SOTOMAYOR, Circuit Judges

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Plaintiff-Appellant Lori Wagner commenced this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), seeking

benefits under a long term disability policy administered by defendant-appellee First Unum Life Insurance Company ("First Unum").

Wagner asserts that the district court should have applied a de novo standard of review to her claim because First Unum's decision denying her long term disability benefits was affected by a conflict of interest. She has not shown, as she must, that the conflict of interest generated by First Unum's dual status as plan administrator and plan insurer "affected the reasonableness of the [administrator's] decision" to deny her long term disability benefits. *See Sullivan v. LTV Aerospace & Def. Co.*, 82 F.3d 1251, 1259 (2d Cir.1996) (internal quotation marks omitted); *see also Pulvers v. First UNUM Life Ins. Co.*, 210 F.3d 89, 92 (2d Cir.2000). The district court was therefore correct to review the defendant's determination under the more deferential arbitrary and capricious standard. Applying this standard of review, we also cannot say that First Unum's decision was "without reason, unsupported by substantial evidence or erroneous as a matter of law." *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 442 (2d Cir.1995) (internal quotation marks omitted).

We have considered all of appellant's claims and find them meritless.[1] Accordingly, we AFFIRM the judgment of the district court.

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[1] Wagner also asserts that the district court should have afforded her discovery to investigate the effect of First Unum's conflict of interest on the decision to deny her benefits. Notwithstanding defendant's contention that such discovery is precluded by our general statement that "under the arbitrary and capricious standard [a district court] is limited to the administrative record," *Miller v. United Welfare Fund*, 72 F.3d 1066, 1071 (2d Cir.1995), discovery may be appropriate in some cases where a petitioner seeks to show a conflict of interest, see *Liston v. UNUM Corp. Officer Severance Plan*, 330 F.3d 19 (1st Cir.2003) ("certain kinds of claims--e.g., proof of corruption--may in their nature or timing take a reviewing court to materials outside the administrative record"); *Farley v. Arkansas Blue Cross & Blue Shield*, 147 F.3d 774, 776 n. 4 (8th Cir.1998) (noting that "conducting limited discovery for the purpose of determining the appropriate standard of review does not run afoul of the general prohibition on admitting evidence outside the administrative record for the purpose of determining benefits"). But because Wagner has not shown "good cause" in support of her request, we affirm the court's decision below denying discovery. See FED.R.CIV.P. 26(b)(1); *DeFelice v. American Int'l Life Assur. Co.*, 112 F.3d 61, 66 (2d Cir.1997).

Civ. 9135(RLC).

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

LORI WAGNER,
Plaintiff,

- against -

FIRST UNUM LIFE INSURANCE COMPANY,
Defendant.

August 13, 2003, Filed

COUNSEL: For LORI WAGNER, plaintiff: Peter G. Eikenberry, New York, NY

For FIRST UNUM LIFE INSURANCE COMPANY, defendant: Begos & Horgan, L.L.P., Bronxville, NY

OPINION BY: ROBERT L. CARTER, District Judge

OPINION:

Plaintiff Lori Wagner commenced this action against defendant First Unum Life Insurance Company ("First Unum"), under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132, claiming entitlement to unpaid long term disability benefits. Both parties now move for judgment on the administrative record, pursuant to Rule 56, F.R. Civ. P.

BACKGROUND

Plaintiff was employed as an international securities market analyst in the global retail trade and restaurant section of an investment banking firm. (Pl. Ltr. at 1.) She worked approximately 10 1/2 hours a day, and up to 18 hours a day while she was traveling. (*Id.* at Ex. 1.) Her job required frequent travel abroad to conduct field evaluations of local economies and of target companies and their competitors. (*Id.*)

Beginning in 1997, plaintiff experienced a number of alleged anaphylactic attacks[1], involving swelling in the throat and of other body parts, tinnitus (ringing in ears), extreme fatigue, headaches, vertigo, rashes, and pruritis (itching). (*Id.* at 2; Def.'s Mem. at 4.) Based on her treating physician, Dr. John Postley's, opinion that it would be dangerous for her to travel, plaintiff secured a modification of her work duties. (*Id.*)

On or about September, 1999, plaintiff submitted a disability claim form, asserting that she became disabled beginning June 19, 1999.[2] (Def.'s Mem. at 4.)

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[1] Anaphylaxis is an unusual or exaggerated allergic reaction. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY (24th Ed.1965).

[2] Pursuant to the insurance plan issued to her employer by First Unum, "disability" and "disabled" mean that because of injury or sickness:

1. the insured cannot perform each of the material duties of his regular occupation; or

2. the insured, while unable to perform all of the material duties of his regular occupation on a full-time basis, is:

a. performing at least one of the material duties of his regular occupation or another occupation on a part-time or full-time basis; and

Her proof of claim was completed in November, 1999, when Dr. Postley submitted an Attending Physician Statement. Dr. Postley stated that plaintiff's primary diagnosis was idiopathic anaphylaxis ("IA"), a severe allergic reaction to an unknown agent. (*Id.*) He wrote, "Patient is not able to travel outside of N.Y.C. or be exposed to extremes in temperature, may not work long hours or become fatigued." (*Id.* at 5.) In a subsequent letter, Dr. Postley clarified that "Ms. Wagner's work requires her to visit companies in developing nations which do not have adequate health facilities.... She may be able to perform other duties but she may not travel in a way which is necessary for her current job description." (*Id.* at 6.)

First Unum conducted a medical review based on Dr. Postley's letters and the medical records that had been submitted. The review concluded that there was a lack of evidence of a continuous disability, as anaphylactic attacks typically occur infrequently and do not require prolonged recovery. (*Id.* at 5.) It also noted that it would be prudent to determine whether travel was a material duty of plaintiff's occupation. (*Id.* at 6.) Toward this end, First Unum commissioned a labor market survey by a consulting company, which concluded that travel is not an essential function of the occupation of Financial Analyst. (*Id.* at 7.) On January 12, 2000, First Unum denied plaintiff's claim, citing both the medical evidence and the labor market survey. (*Id.*)

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b. earning currently at least 20% less per month than his indexed pre-disability earnings due to that same injury or sickness.
(Def.'s Mem. at 3.)

Plaintiff appealed the decision, and submitted new information about her medical condition. Specifically, Dr. Postley, and another doctor, Ahnna Lake, informed First Unum that in addition to IA, plaintiff was also being treated for a series of endocrine imbalances, chronic thyroid inflammation, a hypoadrenal state, and corticosteroid insufficiency. (*Id.* at 8.)

This new medical information was reviewed by Dr. Woolson Doane, an Associate Medical Director for First Unum. (*Id.* at 9.) On April 19, 2000, Dr. Doane concluded that limiting travel to areas without Western style medicine would be advisable, but that adequately treated, plaintiff had "no disease process that precludes sedentary or light work occupations." (*Id.*) Upon speaking with Dr. Lake and reviewing additional medical information, Dr. Doane recommended an expert medical review by an Allergist/Immunologist and an Endocrinologist. (*Id.* at 9-10.)

During this period, Wagner retained consultants who submitted more information about her job classification. (*Id.* at 10.) First Unum conducted a vocational review based on the consultants' reports, and concluded that Wagner was more properly classified as a Market Research Analyst rather than a Financial Analyst. (*Id.*) First Unum further concluded that the occupation of Market Research Analyst may require travel. (*Id.*)

Upon receipt of this information, some of which was incorporated in a letter written on plaintiff's behalf by Robert Cope, whose company served as Administrator of Benefits for the Securities Industries Association, First Unum notified Wagner on May 25, 2000, that it would commence paying benefits, retroactively, with a

reservation of rights, while it continued to gather medical information through Independent Medical Examinations ("IME's") and a personal interview. (R. 300-301.) First Unum continued to make payments to Wagner through January 25, 2001. (Pl.'s Ltr. at 2.)

In December of 2000, First Unum informed Wagner that, rather than setting up IME's, it was "sending her medical records to an outside consortium for impartial review." (Def.'s Mem. at 10.) Three doctors examined plaintiff's file. Dr. N. Franklin Adkinson, Jr., Professor of Medicine at Johns Hopkins University and Training Program Director of its Allergy/Immunology Program, found no objective evidence of angioedema (the internal swelling that could accompany an IA episode and lead to breathing difficulty), and stated that even if plaintiff had IA, most patients with IA lead normal lives and continue work and family responsibilities, and that the vast majority of patients with IA improve over time. (Def.'s Mem. at 10-11; R. 425-26.)

Dr. Paul A. Fitzgerald, board certified in Endocrinology, Metabolism and Internal Medicine, and a Clinical Professor at the University of California School of Medicine, concluded that the test results reported by Dr. Lake were "entirely normal," and that Wagner's medical file and laboratory reports did not indicate adrenal insufficiency. (Def.'s Mem. at 11-12; R. 408.)

Dr. Sheldon Hersh, a Fellow of the American Academy of Disability Examining Physicians, and a Certified Independent Medical Examiner, stated that he did not see "any firm evidence from any medical observer that this claimant has Idiopathic Anaphylactic Syndrome,"

and that Dr. Lake's diagnoses of hyopadrenalism, hypothyroidism, sex hormone imbalance, and osteopenia were tenuous. (Def.'s Mem. at 11-12; R. 411-19.) He suggested that many of Wagner's symptoms, including fatigue, malaise, decreased cognition, poor memory, and sleep disturbance, could be the result of a depressive disorder.[3] (R. 412.)

Dr.'s Adkinson and Hersh suggested that, if Wagner was indeed suffering from IA, the only restriction that would be placed on her would be a limitation on long distance travel (if her IA attacks were frequent and severe) or on travel to underdeveloped countries. (R. 413, 425.) First Unum obtained a vocational analysis to determine whether such travel was one of the material and substantial duties of a Market Research Analyst. The vocational analyst concluded that it was not. (Def.'s Mem. at 12-13.)

In addition to occupational and medical information, First Unum conducted a personal interview with Wagner, in which she detailed her health problems and the resulting major limitations on her lifestyle. For example, plaintiff stated that she can only function and accomplish tasks for 2 to 3 hours per day, usually in the late morning or early afternoon. She reported that she typically needed to nap by around 4 P.M., and seldom went out at night due to fatigue. (Pl.'s Ex. 1.) First Unum conducted surveillance of Wagner's activities, which appeared consistent with the interview data.

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[3] The court notes that Wagner was seeing a counselor and had been prescribed the drug Wellbutrin in 1999. Therefore, if plaintiff had a depressive disorder, she could have submitted her counselor's records to support a claim of disability on that basis.

With all of this information before it, First Unum concluded that Wagner was not disabled within the meaning of the policy at issue. Specifically, defendant did not accept that Wagner had restrictions or limitations due to a specific diagnosis. Furthermore, they reasoned that, even if plaintiff did have IA, this would not prevent her from performing the material duties of her job, because travel to underdeveloped countries is not a generalized requirement of her occupation as it appears in the national economy. (Def.'s Mem. at 13 .)

Plaintiff appealed the decision administratively and that appeal was denied. Thereafter, plaintiff submitted additional information about her occupation and doctors' notes from three more physicians, which supported the diagnoses of her treating physicians and suggested that she had an autoimmune multisystem disease and IA. (R. 508-15.) One of the doctors, Leo Galland, also diagnosed her with chronic fatigue syndrome. First Unum obtained a medical review of the new information, which concluded: "the three letters referred to above describe multiple subjective complaints but present no new medical support for additional restrictions." (Def.'s Mem. at 14.) On July 30, 2001, First Unum notified plaintiff that the additional information did not alter its conclusion that she was not disabled. (*Id.*) This action followed.

DISCUSSION

I. Summary Judgment Standard

Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56, F.R. Civ. P. In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962)). "In considering the motion, the court's responsibility is not to resolve disputed issues of fact but to assess whether there are factual issues to be tried." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir.1986).

II. ERISA Standards

Where discretionary authority is afforded an ERISA-regulated plan administrator, as it is here, denial of plan benefits is generally reviewed under an "arbitrary and capricious" standard of review. *Pulvers v. First Unum Life Ins. Co.*, 210 F.3d 89, 92 (2d Cir.2000). An exception arises where a plan administrator is acting under a conflict of interest, and has in fact been influenced by the conflict of interest. *Id.* In such a case, de novo review is appropriate. *Id.*

The parties disagree as to which standard of review should govern in this case. First Unum served as both a plan administrator and plan insurer, which, according to plaintiff, makes it a conflicted body. *See, e.g., Sullivan v. LTV Aerospace and Defense Co.*, 82 F.3d 1251, 1255-56 (2d. Cir.1996). Plaintiff points to two facts to support its contention that First Unum was influenced by this conflict: 1) that First Unum decided not to conduct a physical examination of her; and 2) that First Unum

stated in its January 27, 2001 letter denying benefits that it had determined that Wagner was "no longer" disabled, though there was no evidence that her condition had improved.

The fact that First Unum decided against a physical examination, without more, is not evidence that First Unum was influenced by a conflict of interest. First Unum sent Wagner's records to three doctors for evaluation. While a physical examination may have been informative, there is nothing before the court that indicates that First Unum's actions were improper or insufficient under the circumstances.

Plaintiff makes much of the wording of the January 27, 2001 letter, arguing that the fact that a First Unum representative stated that she was "no longer" disabled indicates that First Unum had previously determined that she was disabled and then arbitrarily changed its decision. The record as a whole does not support this contention. Defendant granted plaintiff benefits under a reservation of rights, stating that "[a]lthough we will commence paying these benefits, there is outstanding information needed to make a final determination of your eligibility. As a result, any payment ... cannot be construed as an admission of present or future liability." (R. 300-01.) Upon further investigation, defendant concluded that there was insufficient evidence of a disability. Unfortunate wording aside, the letter was simply meant to inform plaintiff that it would no longer pay her benefits.

As there is no evidence that First Unum was influenced by a conflict of interest, the court will review the denial of benefits under an arbitrary and capricious standard.

A court may set aside a decision to deny benefits as arbitrary and capricious only if it was "without reason, unsupported by substantial evidence or erroneous as a matter of law." *Maniatty v. Unumprovident Corp.*, 218 F. Supp 2d 500, 502 (S.D.N.Y.2002) (Rakoff, J.) (citing *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 442 (2d. Cir.1995)). This scope of review is narrow; thus the court may not substitute its own judgment for that of the plan administrator "as if it were considering the issue of eligibility anew." *Id.*

Plaintiff argues that First Unum's determination was arbitrary and capricious because she was never subject to an IME, and defendant relied on the opinions of non-examining physicians over plaintiff's own treating physicians. The court rejects plaintiff's arguments. First, the court is not convinced that an IME was critical in this case, as plaintiff's symptoms and test results were in her file and three doctors analyzed this information. *See Alakozai v. Allstate Ins. Co.*, 98 Civ. 3720, 2000 WL 325685, at *7 (S.D.N.Y. March 28, 2000) (Casey, J.) (acceptance of opinions of two non-treating medical reviewers not arbitrary and capricious). Second, the administrator of an ERISA plan is not required to accord treating physicians' opinions greater weight than non-treating physicians. *See Black & Decker Disability Plan v. Nord*, 538 U.S. 822, ----, 123 S.Ct. 1965, 1972, 155 L.Ed.2d 1034 (2003). It is clear from the record that First Unum reviewed the opinions of Wagner's treating physicians, but after consulting with Dr. Adkinson, Dr. Fitzgerald, and Dr. Hersh, reached a different conclusion as to whether Wagner had a disability that would prevent her from working within her occupation as it is performed generally. Perhaps First Unum could have given greater

consideration to the possibility that Wagner suffered from chronic fatigue syndrome, but overall, defendant's determination of Wagner's claim had support in the record and was not clearly erroneous.

CONCLUSION

There is no doubt in the court's mind that plaintiff has experienced great difficulties with her health over the years. Nevertheless, based on a careful review of the record and in accordance with the highly deferential standard of review applied to such determinations, the court declines to substitute its judgment for that of First Unum. Summary judgment is granted to defendant.[4]

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[4]Plaintiff requested that discovery beyond the administrative record be allowed in the event judgment were not granted. As judgment has been granted to defendant, this issue is moot.